



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 79 OF 2015

BETWEEN

KEVIN SAMUNYA MUDENYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of life imprisonment for the offence of Defilement

contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act, 2006 in a judgment delivered by

Hon. J.K Ngarnqar, Senior Principal Magistrate on 14th November,2012 in Hamisi Criminal Case No.691 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background and Brief Facts

1. This appeal stems from the judgment of the learned trial magistrate aforementioned. The appeal was filed by the appellant on 23rd July 2015 seeking that his sentence be set aside and conviction quashed or in the alternative, a fresh trial be ordered on the following grounds as set out in the appellant's supplementary grounds of appeal *inter alia* THAT:-

- a. I did not understand the charges and its implication of pleading guilty.**
- b. I did not understand well the language used in plea.**
- c. I was misled by the police to plead guilty as he said that I will be released.**
- d. The trial court did not consider that the plea was not in accordance with article 50(2) of the Constitution.**
- e. The trial court erroneously convicted me without considering that the plea was not done in accordance with section 198 of the CPC.**

2. The appellant was charged with the offence of defilement contrary to *section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006* and an alternative charge of *committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006*. The particulars of the charge on the main count are that the appellant on 1st November 2012 at [Particulars Withheld] village, in Hamisi District within Vihiga County intentionally caused his penis to penetrate the anus of a girl named S.I who was 9 years of age.

3. At the conclusion of the trial, the learned trial magistrate convicted the appellant on his own plea of guilty on the main charge of Defilement contrary to *section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006* and sentenced him to life imprisonment as by law provided.

4. This is the first appellate court and as such it is guided by the principles set out in the case of *David Njuguna Wairimu V – Republic [2010] eKLR* where the Court of Appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

5. In the much earlier decision of *Okeno vs. Republic* [1972] EA 32, the Court of Appeal held that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

Issues for Determination

6. The twin issues for determination are:-

- a. Whether the appellant’s plea of guilty was unequivocal .
- b. Whether the sentence meted out by the trial court was excessive and/harsh in the circumstances.

a) Whether the appellant’s plea of guilty was unequivocal

7. It was the appellant’s submission that his plea of guilty was equivocal as the mental assessment report relied upon by the learned trial magistrate was not shown to him and that the language of the appellant was not known and that he was not familiar with the Swahili language as was recorded by the learned trial magistrate and thus never understood the charges. The appellant added that the trial court did not take into account the circumstances that led him to plead guilty which included intimidation by the police and the court’s environment.

8. In the case of *Simon Gitau Kinene v Republic* [2016] eKLR Joel Ngugi J held that:-

“I should begin by pointing out that the Trial Court record does not have any indication that there was an attempt to bring to its attention the suspicion that the appellant was mentally ill. It also does not have any indication that the appellant behaved in any way that would have alerted the Trial Court that the appellant was anything than mentally sound. Indeed, his mitigation would seem to suggest an ability to logically communicate in a way which would not raise any concern in the mind of the Trial Court as to his mental status.

9. I have raised the issue of the Trial Court record because **section 11 of the Penal Code** and **section 162 (1) and (2) of the Criminal Procedure Code** are important here. **Section 11 of the Penal Code** provides as follows:-

“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”

10. On the other hand, **section 162 of the Criminal Procedure Code** reads as follows:-

“162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

11. The law therefore is that every accused person is presumed to be of sound mind under section 11 of the Penal Code. **The burden is on the accused person to rebut this presumption.** However, the Court is obligated under **section 162** to take action – for example by ordering a mental assessment – examination where it comes to the attention of the Court that the accused person may be of unsound mind.

12. In the present case, the Trial Court cannot be faulted for proceeding as it did in the circumstances. There was simply **no material brought to the attention of the Trial Court to suggest that the appellant was of unsound mind** to warrant further inquiry by the Court into his state of mind. In any event the mental status report dated 12.11.2012, which was prepared following the court order of 7.11.2012, clearly indicated that the appellant was in a normal state of mind and could therefore plead to the charge. The appellant did not controvert that report.

13. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in *Adan v Republic*(1973) EA 445 at 446:-

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

The first point for analysis is an important point of departure namely the trite law stated by the Court in *Ombena v Republic* 1981 KLR 450 to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.”

14. Judge Joel Ngugi went on to state in the *Simon Gitau Kinene Case* (above) that:-

“Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an accused person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)* this is what I said and I find it relevant here:-

“In those cases [where there is an unrepresented Accused charged [with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the accused person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the accused person for, it behooved the Court to warn the accused person of the consequences of a guilty plea.”

15. The manner of recording of pleas is further anchored in *Section 207(1) and (2) of the Criminal Procedure Code* provided as hereunder:

“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

16. The record of the trial court herein indicates that it was initially noted by the said court that the appellant was not aware of where he was and where he lived and it was ordered that he undergoes a mental assessment before he could plead to the charges. This was in line with *section 162(1) and (2) of the Criminal Procedure Code*.

17. A mental assessment report was filed in court and from the report, the court was informed that the appellant was of sound mind and could plead to the charges. The record indicates that the charge was read over to the appellant in Kiswahili language which he was said to understand and in response, he replied, **“It is true”** in Kiswahili. The record further shows that the trial court went ahead and warned the appellant of the consequences of pleading guilty to the charge, to which the appellant replied that he was aware of the consequences. The record further shows that the facts of the case were presented by the respondent to which the appellant replied that the said facts were correct.

18. It follows from the above analysis that the plea of guilty entered by the trial court was as unequivocal as it could get. The manner of taking and recording the plea fully complied with the provisions of *section 207(1) and (2) of the Criminal Procedure Code* and the guidelines set out in the case of *Adan v Republic*(1973) EA 445 (*supra*). It is therefore incorrect to aver that the plea of guilty was equivocal as was submitted by the appellant. That ground of appeal cannot stand. The appeal on conviction accordingly has no merit.

b) Whether the sentence meted out by the trial court was excessive and/harsh in the circumstances

19. The appellant submitted that he had no problem with the conviction but only asked the court to reduce his sentence. I note that *Section 8(2) of the Sexual Offences Act* provides that **“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”** The wording of the section is couched in mandatory terms.

20. The Supreme Court of Kenya, in the case of *Francis Karioko Muruatetu & Another vs. Republic, 2017 eKLR* stated, *inter alia*, that:-

“Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration

the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

.....

“We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

.....

As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender- based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

21. Recently, the Court of Appeal, in the case of *Evans Wanjala Wanyonyi v Republic* [2019] eKLR, held that:-

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the afore stated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.”

In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.”

22. In the instant case, the learned trial magistrate meted out the mandatory sentence provided for by section 8(2) of the Sexual Offences Act, 2006 which was life imprisonment. However and as stated above, the Court of Appeal has since held that the mandatory sentences stipulated by the Sexual Offences Act, 2006 are unconstitutional. This means that courts can now consider factors such as but not limited to mitigation from accused persons while following the guidelines set by the Supreme Court of Kenya in Francis Karioko Muruatetu Case [above] together with pre-sentencing reports/statements from victims, if any, in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

23. In the present case, after the appellant was convicted, the respondent asked the court to treat him as a first offender. In mitigation, the appellant simply told the court he was 20 years old and he had nothing else to say. The facts of the case indicate that the appellant also physically assaulted the victim S.I as he defiled her. He even threatened to kill her if she dared to raise alarm. The appellant showed no remorse for his actions, and during the hearing of the appeal, the appellant stated:-

“I am asking the court to reduce my sentence. I do not have any problem with the conviction. That is all.”

24. From the Supreme Court decision in the *Muruatetu Case*, (above) and the subsequent Court of Appeal decisions, I am convinced that this court has the power to interfere with the life sentence imposed upon the appellant by the learned trial court. It is also my humble view that the appellant must by now have sobered up from his experience in prison and that he has a chance of rehabilitation leading to a normal life if granted an opportunity to do so. I would therefore set aside the sentence of life imprisonment and in lieu thereof impose a term of 30(thirty) years imprisonment with effect from the date the trial court sentenced him.

Conclusion

25. In conclusion, I make the following final orders:-

a. The appellant's appeal on conviction be and is hereby dismissed.

b. The appellant's appeal on sentence be and is hereby allowed to the extent that the sentence of life imprisonment is set aside and substituted with a term of thirty (30) years imprisonment with effect from 14.11.2012.

c. Right of appeal within 14 days from the date of this judgment.

26. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega in open court on this 18th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:-

Appellant present in person

No appearance for Respondent

Eric - Court Assistant